No. 80720-5

SUPREME COURT
OF THE STATE OF WASHINGTON

**KITSAP COUNTY DEPUTY SHERIFF'S GUILD; and DEPUTY BRIAN LAFRANCE and JANE DOE LAFRANCE, and the marital community composed thereof,**

**Petitioner,**

**v.**

**KITSAP COUNTY and KITSAP COUNTY SHERIFF,**

**Respondent.**



# PETITIONER'S SUPPLEMENTAL BRIEF

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## I. STATEMENT OF THE CASE

The Kitsap County Deputy Sheriff's Guild arbitrated a grievance concerning the discharge of Deputy Brian LaFrance under its Collective Bargaining Agreement (CBA) with Kitsap County. Arbitrator David Gaba issued an Award in the Guild's favor.[1] This appeal involves a Court of Appeals decision vacating that Award.[2]

Brian LaFrance was a good deputy who began having performance issues.[3] LaFrance developed psychological problems that interfered with his work, including obsession and paranoia.[4] Much of LaFrance's obsession and paranoia involved his supervisor, Lt. James Harris,[5] who he suspected was involved in criminal activity, including prostitution.[6] Through 2001, LaFrance faced a series of investigations initiated by Harris.[7] Initially, the County alleged poor performance and later added "dishonesty."[8] LaFrance was terminated in November 2001.[9]

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[1] *See* CP 1208-1254, especially 125.4.
[2] *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 140 Wn.App. 516, 165 P.2d 1266 (2007).
[3] CP 1214-15.
[4] CP 1216-1219.
[5] CP 1219.
[6] Harris had a personal "relationship" with an escort at "Roxanne's Escort Service." CP 1248. Not all LaFrance's paranoia lacked a reality basis: Gaba found that Harris had, in fact, at one point lifted an investigative file concerning Roxanne's from the Sheriff's property room and had singled out LaFrance for harsh treatment. Harris resigned from the Department after being investigated for selling stolen property. CP 1248-49.
[7] CP 1215-1224. Harris' investigations alleged neglect of duty, incompetence, refusal to follow orders and failure to properly complete paperwork or handle evidence.
[8] CP 1236-1237.
[9] CP 1229.

The Guild grieved.[10] After a hearing, Gaba concluded that the allegations had a basis but the discipline was too harsh.[11] Gaba described LaFrance's behavior as "evasive, erratic and confused"[12] but rejected the County's claim that LaFrance had intentionally lied:

> It is fair to note that reasonable minds could differ as to the interpretation of Deputy LaFrance's behavior; for instance what the employer describes as the grievant "dodging, equivocal and double-tongued responses to questions about case reports, property and evidence" during the hearing could also be described as the wandering incoherent answers of an obviously ill ex-employee.[13]

Gaba found the County had not uniformly treated dishonesty as a terminable offense.[14] He ruled that the County had contributed by failing to address LaFrance's obvious mental health issues, rescinded the termination and ordered that LaFrance be allowed to return to full duty upon passing a fitness examination.[15]

Under the parties' CBA, the arbitration was to be "final and binding,"[16] but the County refused to reinstate LaFrance. The Guild filed a suit in Pierce County Superior Court claiming that LaFrance was entitled to a return to pay status upon the Award's July 2004 release.[17] While that suit was pending, LaFrance passed a fitness examination.[18] The County

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[10] CP 1233.
[11] CP 1254. He allowed the County to substitute three written warnings.
[12] CP 1228.
[13] CP 1251.
[14] CP 1247.
[15] CP 1251-53.
[16] CP 1208.
[17] CP 3-7.
[18] CP 1119 ¶12.

returned him to duty in December 2004[19] but shortly thereafter filed its own legal action challenging the Award.[20]

The actions were consolidated and both parties filed for summary judgment.[21] The Honorable John McCarthy found the award valid but held that the County owed LaFrance no back pay prior to the finding of fitness for duty.[22] The County appealed to the Court of Appeals, Division II and the Guild cross-appealed. The court reversed, finding Arbitrator Gaba's award violated "public policy." The Court of Appeals never reached the Guild's cross-appeal issue. After an unsuccessful reconsideration motion, the Guild filed a Petition for Review which this Court granted.

## II. ARGUMENT

### A. Summary of Argument

This Court has ruled that labor arbitration decisions contracted by the parties to be "final and binding" are to be treated as "final and binding." This deference is so great it extends not only to errors of fact *but also to errors of law.* This deference was not accorded by the Court of Appeals. It set aside the Award, citing "public policy." No Washington discipline arbitration award has ever been set aside on these grounds.

The Guild does not contest that public policy might in a *rare case* justify setting aside an award. Instead, it asserts the Court of Appeals, applied this exception in a manner *substantially broader* than recognized

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[19] CP 1139 ¶13.
[20] *See* CP 1122.
[21] CP 1119-35, 1454-69.
[22] CP 1560-63, 1586-87.

by federal case law—law which this Court has indicated is to be followed in judicial review of labor arbitration awards. That law recognizes only a *narrow* public exception, requiring reviewing courts to: 1) Accept the arbitrator's fact findings; 2) Refuse enforcement of an arbitration award only when it contravenes a mandate expressly contained in law; and 3) Refuse enforcement of an award only when that mandate is contravened by the *reinstatement* of the employee, not by the employee's conduct. The Court of Appeals decision failed *all three* of these tests. Because deviation from *any one* of these principles requires reversal, the Court of Appeals should be reversed.

**B. As it has in the past, this Court should apply the Federal Precedent that limits Judicial Review of Final and Binding Labor Arbitration Awards.**

This Court has followed the federal court practice of refusing to review the merits of an arbitration decision.[23] This deference is great—arbitration awards are deemed non-reviewable not simply as to errors of fact *but also as to errors of law.*[24] The U.S. Supreme Court adopted this deference policy in the "Steelworkers Trilogy"[25] cases. It held that the

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[23] *See Clark County PUD v. Wilkinson*, 150 Wn. 2d 237, 76 P3d. 248 (2003); *Peninsula School District v. Public School Employees,* 130 Wn. 2d 401, 413-14, 924 P.2d 13 (1996) *See also, Firefighters Local 1433 v. City of Pasco*, 53 Wn. App. 547, 550-551, 768 P.2d 524 (1989); *Meatcutters Local 494 v. Rosauer Super Markets, Inc.*, 29 Wn. App. 150, 154, 627, P.2d 1330 (1991); *D.S.H.S. v. State Personnel Board*, 65 Wn. App. 508, 513-14, 828 P.2d 1145 (1992).

[24] *See Clark County PUD v. Wilkinson, supra*, 150 Wn. 2d at 245.

[25] *Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel*, 363 U.S. 593 (1960).

judiciary should not review the merits of arbitration awards, reasoning that the policy of settling labor disputes by arbitration would be undermined if the courts had the final say.[26]

In *Clark County PUD v. Wilkinson*[27] this Court overturned the Court of Appeals because it had delved into the merits of an Award, restating Washington's acceptance of the *Steelworkers Trilogy*.[28] There are strong policies supporting strict deference, even *when a court might wish to question the judgment of a given arbitrator.*[29] In agreeing to binding arbitration, the parties intentionally waive their appeal rights, even

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[26] As it explained in *Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597: "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." The *only* judicial inquiry the Court permitted was to determine if the award was confined to the CBA, indicating the award must "draw its essence" from the CBA. *Id.,* at 597. In *United Paperworkers v. Misco*, the Court elaborated on the "essence" test indicating that "as long as the arbitrator is even arguably constructing or applying the contract and acting within the scope of his authority, *that a court is convinced he committed a serious error does not suffice to overturn his decision.*" *United Paperworkers v. Misco,* 484 U.S. 29, 38 (1987) (Emphasis supplied). The Court added: "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." *Id.,* at 37, *citing Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-568 (1960).

[27] 150 Wn. 2d 237, 76 P3d. 248 (2003).

[28] The Court explained: "When reviewing an arbitration proceeding, an appellate court does not reach the merits of the case. The common law arbitration standard, applicable when judicial review is sought outside of any statutory scheme or any provision in the parties' agreement, requires this extremely limited review. The doctrine of common law arbitration states that the arbitrator is the final judge of both the facts and the law, and 'no review will lie for a mistake in either.'" 150 Wn. 2d at 245. *See also, Peninsula Sch. Dist. v. Public Sch. Employees*, 130 Wn. 2d 401, 413-14, 924 P.2d 13 (1996) when determining arbitrability "the court cannot decide the merits of the controversy").

[29] This court expressly recognized this principle in *Clark County PUD* in quoting *Richmond, F. & P. R.R. v. Transp. Communications Int'l Union*, 973 F.2d 276, 282-83 (4th Cir. 1992). ("Nothing would be more destructive to arbitration than the perception

though an appeal could provide a more "legally accurate" result, in favor of the competing values of efficiency and workplace harmony.[30]

Washington courts recognize that to effectively enforce a CBA, an arbitrator must have *broad authority* to grant remedies.[31] Federal decisions recognize a narrow exception to the deference principle: Arbitration awards involving reinstatement can be set aside when reinstatement would violate public policy. Prior to *Kitsap County*, this judicial authority had never been exercised in Washington over a discipline arbitration award. But the Guild does not contest that this exception can be invoked. Instead the Guild asserts that this Court, consistent with its approach of following federal law concerning judicial

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that its finality depended upon the particular perspectives of the judges who review the award.") 150 Wn.2d at 247.

[30] Workplace disputes should not drag on forever. Parties to labor agreements have finite resources and other matters to address. These concerns were specifically addressed by this Court in *Clark County PUD* when it critically noted that litigation over a fairly routine grievance had resulted in 6 years of litigation. 150 Wn.2d at 248.

[31] As stated in *IAFF v. City of Pasco*, the authority of an arbitrator to decide the merits of a dispute includes broad authority to issue an appropriate remedy: "Consistent with this policy, Washington decisions allow arbitrators wide latitude in fashioning awards." *IAFF v. City of Pasco*, 53 Wn.App. 547, at 500 and 526. Citing *Endicott Educ. Ass'n v. Endicott Sch. Dist. 308*, 43 Wn. App. 392, 394-95, 717 P.2d 763 (1986); *North Beach Educ. Ass'n v. North Beach Sch. Dist. 64*, 31 Wn. App. 77, 85-86, 639 P.2d 821 (1982). Admittedly, this remedial authority is not limitless. In *Kennewick Education Association v Kennewick School District*, 35 Wn.App. 280, 282, 666 P.2d 928 (1983), the Court of Appeals refused to enforce an arbitration decision awarding punitive damages, noting that punitive damages contradicted Washington public policy. Other than *Kennewick* and *Kitsap*, no other Washington appellate decision has set aside an arbitration award based on public policy. In *IBEW Local 77 v. Grays Harbor PUD,* 40 Wn.App 61, 696 P2d. 1264 (1985), the Court of Appeals stated in *dicta* that "public policy is a ground for refusing to enforce a collective bargaining agreement," but it did not define the exception.

review of labor arbitration awards, should adopt and apply only the very narrow public policy exception recognized in that federal law.

Three U.S. Supreme Court decisions[32] define the extent to which a federal court may vacate an arbitrator's award for violating public policy: 1) the arbitrator's findings are to be accepted; 2) review does not consider the *general public interest* but only whether there exists a *mandate in public policy found explicitly in law; and 3)* review of an employee discipline arbitration award considers only whether *the reinstatement order itself would violate public policy, not whether the employee's underlying conduct did.* As discussed below, because the Court of Appeals failed to apply these limiting principles, its decision should be reversed.

### C. The Court of Appeals Erred by Deviating from the Deferential Precedent limiting Judicial Review.

#### 1. The Court of Appeals Erred by Revisiting the Findings of Fact Adopted by the Arbitrator.

##### a) The Limited Judicial Review of an Arbitration Decision involves no Revisitation of an Arbitrator's Findings of Fact.

Federal court review of arbitration awards involving the public policy claim does *not* permit the adoption of "facts" never adopted by the arbitrator.[33] As the Ninth Circuit Court recently explained:

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[32] *W.R. Grace & Co v. Rubber Workers Local 759*, 461 U.S. 757, 766 (1983); *United Paperworkers International Union v. Misco*, 484 U.S. 29 (1987); *Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57 (2000).

[33] This principle is most clearly enunciated in *Misco*: "[I]t was inappropriate for the Court of Appeals itself to draw the necessary inference...The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them...Nor does the fact that

> But regardless of whether [the Arbitrator] deemed the evidence irrelevant or unpersuasive, under *Misco*, the courts cannot second-guess the arbitrator's findings, even while conducting a public policy inquiry....The district court erred by reweighing this evidence and substituting its own judgment for that of the arbitrator.[34]

Such finality is especially critical in discipline arbitrations. As this Court has recognized in *Civil Service Commission of the City of Kelso v. Stair,*[35] where a CBA contains a "just cause" provision the arbitrator makes a wide-ranging assessment:

> "Just cause" is a term of art in labor law, and its precise meaning has been established over 30 years of case law. Whether there is just cause for discipline entails much more than a valid reason; it involves such elements as procedural fairness, the presence of mitigating circumstances, and the appropriateness of the penalty.[36]

Citing the deference mandated by *W.R. Grace*, this Court concluded that the arbitrator is the ultimate authority over contract interpretation.[37]

**b) The Court of Appeals disregarded and then revised the Arbitrator's Findings of Fact.**

When Kitsap County agreed in the CBA that discipline would be only for "just cause" and subject to final and binding arbitration, it simultaneously promised to forego any challenges to the arbitrator's

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it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task." 484 U.S. at 44-45.

[34] *Aramark Facility Services v. SEIU, Local 1877,* 530 F. 3d 817, 823 (9th Cir. 2008). The court later added that the arbitrator's "factual findings are not up for discussion." *Id.* at 828.

[35] 137 Wn.2d 166, 969 P.2d 474 (1999).

[36] *Id* at 173.

[37] Id. at 174. ("The arbitrator's interpretation of the meaning of "just cause" and her conclusion that the just cause standard was not applied by the Commission may not be second-guessed by this court. *W.R. Grace,* 461 U.S. at 765.")

findings. But by allowing the County to reargue "facts," the Court of Appeals undermined the important policy of finality in labor decisions– *precisely what this Court had warned it about in Clark County PUD.*[38]

The County challenged the award in its Superior Court Motion for "After-Arising Counterclaims,"[39] asserting, *for the first time,* that criminal discovery rules defined by *Brady v. State of Maryland*[40] made LaFrance unfit. But questions as to fitness should *not* be decided *in court* where, as here, the parties, have agreed that all tenure questions *must be arbitrated.* The "after-arising" claim that the *Brady* somehow affects LaFrance's tenure must be referred to the CBA arbitration process and be subject to a complete hearing, including the right of cross-examination.[41]

This case demonstrates *why* awards should be treated as final. The Court of Appeals found that "LaFrance's proven record of dishonesty

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[38] 150 Wn. 2d at 246.

[39] CP 1139-40, ¶14-17. (Declaration of Dennis Bonneville in Support of Motion to Present After Arising Counterclaims states that Undersheriff Bonneville did not pursue potential untruthfulness *until* LaFrance had already returned to work.)

[40] 373 U.S. 83 (1963).

[41] This post-arbitration challenge is exactly the type of challenge disallowed by *Misco.* In fact, this case is more egregious that the employer challenge disallowed in *Misco* in that it involves evidence *never presented* to the Arbitrator. In *Misco* the Court held that it was within an arbitrator's discretion to bar post-discharge misconduct evidence. This is in accordance with the generally adopted principle of arbitration that the discharge "must stand or fall on the reasons stated at the time of the discharge." *See* Elkouri and Elkouri, HOW ARBITRATION WORKS 977-980 (6th ed. 2003). *See* also Koven and Smith, JUST CAUSE: THE SEVEN TESTS, 297-98 (3rd ed. 2006) suggesting post-discharge allegations are "routinely excluded" and, at 305, indicating that "the clock stops with the discharge." This principle was expressly recognized by the Ninth Circuit in *Aramarck, supra,* 530 F.3d at 831 n.9. But in this case, the County argues that "public policy" bars reinstatement not just based on allegations discredited by Arbitrator Gaba but *upon evidence that it never even proferred to Gaba.*

prevents him from useful service as a law enforcement officer"[42] yet, the *Arbitrator never found that LaFrance intentionally lied.*[43] Although Gaba cited LaFrance's lack of candor, he attributed LaFrance's "bizarre" behavior to mental health problems, undermining any intentionality claim. Any challenges to the award, per *Misco* and its progeny, *must* accept these findings as conclusive.

Even if Gaba's findings *were subject* to second-guessing, the County is flatly wrong in its contentions that LaFrance is inexorably disqualified from employment. The County's argument involves leaps of logic. *Brady* is a rule of discovery, *not* admissibility *and even less is it a rule about tenure rights under a labor contract "just cause" standard.* The absence of an arbitration finding of intentional lying takes this case out of the *Brady* requirement, but even if it did not, *whether this results in LaFrance being disqualified from any position as a deputy sheriff is an issue the parties have agreed only an arbitrator can decide.* The Court of Appeals erred by allowing the County a collateral and after-the-fact attack.

**2. The Court of Appeals Erred by Overturning the Arbitration Award based on "Public Policy" while failing to identify any "Public Policy" violated by the Award.**

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[42] 140 Wn. App. at 526.

[43] Although Gaba sustained the employer's charges of "dishonesty," that finding of a *general class* of infraction is well short of a *specific finding* of intentional lying. Lying involves the *intentional* making of a statement of fact that the teller *knows* to be false. Dishonesty can arise in a variety of contexts well short of an actual "lie."

**a) The narrow "public policy" exception applicable to the enforcement of final and binding labor arbitration awards requires that an "explicit, well-defined and dominant public policy" grounded in law be identified as a precondition to any "public policy" challenge.**

Given the deference accorded awards, a court does not apply its own "common sense" beliefs about whether the conduct warranted discharge.[44] Despite the appeal of "common sense" such a review would supplant the role the parties contractually assigned to the arbitrator.

The Supreme Court explained in *W.R. Grace* that the public policy exception "is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"[45] The Court stated that it would *only* refuse to enforce an award which violated "some explicit public policy." [46]

Later, in *Eastern Associated Coal,* the Court upheld an arbitration award on the grounds that it did not violate positive law:

> We agree, in principle, that courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law. Nevertheless, the public policy exception is narrow and must satisfy the principles set forth in *W. R. Grace* and *Misco*. Moreover, in a case like the one before us, where two political branches have created a detailed regulatory regime in a specific field, courts should approach with particular caution pleas to divine further public policy in that area.[47]

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[44] *See* Misco, 461 U.S. at 44.

[45] *W.R. Grace & Co. v. Rubber Workers Local 75,* 461 U.S. 757, 766 (1983); (quoting *Muschanv v. United States*), 324 U.S. 49, 66 (1945).

[46] *Id.*

[47] 531 U.S. at 63.

Even though the Supreme Court stopped just short of enunciating a "positive law" violation standard, commentators have concluded that for all practical matters, the functional application of the public policy exception requires an actual violation of positive law.[48]

**b) The Court of Appeals never identified any public policy grounded in law warranting reversal of the final and binding labor arbitration award.**

The Court of Appeals deviated from federal standards *by failing to identify with specificity the public policy at issue.* As the Supreme Court explained in *Misco*, any "alleged public policy must be properly framed under the approach set in out *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced."[49]

The court cited RCW 36.28.010 which merely establishes the scope of Sheriff's duties. The court failed to identify *how* Gaba's award specifically violated this statute. The court's findings that LaFrance could no longer provide "useful service" and that he "cannot possibly serve" as a Deputy Sheriff[50] are in direct conflict with Gaba's findings that, upon passing a fitness examination, LaFrance could be restored to duty.

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[48] The first to do so was Justice Scalia in his concurring opinion. In commenting on the high standard created in the majority opinions, Scalia concluded that "[i]t is hard to imagine how an arbitration award could violate a public policy, identified in this fashion, without actually conflicting with positive law." 531 U.S. at 68. Any pre-*Eastern Associated Coal* lower court decisions are of questionable authority to the extent they applied a broader test for the relevant public policy. *See also* Ogden, *Do Public Policy Grounds Still Exist for Vacating Arbitration Awards?* 20 HOFSTRA LAB L.J. 87 (2002).

[49] 484 U.S. at 43.

[50] 140 Wn.App. at 526.

3. **The Court of Appeals erred by refusing to enforce a Final and Binding Labor Arbitration Award requiring Reinstatement of Employment while citing Public Policy Having no Bearing on Reinstatement.**

   a) **The narrow "public policy" exception applicable to the enforcement of final and binding labor arbitration awards requires that any public policy invoked to overturn an employment reinstatement order must relate to the reinstatement, not the employee's underlying conduct.**

The Court of Appeals erred further by failing to show how those laws were violated *by Gaba's reinstatement order.* As the U.S. Supreme Court has emphatically held, the question before a court is *not* "whether [the employee's misconduct] violates public policy, but whether the agreement to reinstate him does so."[51]

The appropriately narrow review is well exemplified by an Oregon Supreme Court decision—*Washington County Police Officers Association v. Washington County.*[52] There, the court addressed whether public policy barred enforcement of an award reinstating an officer who had tested positive on a drug test for marijuana and had also lied:

> Thus, the enforceability of the arbitrator's award does not turn on whether the employee's purchase and personal use of marijuana or being dishonest about it in response to the positive drug test violated some public policy. The proper inquiry, instead, is whether the *award itself* complies with the specified kind of public policy requirements. In other words, does an award ordering

[51] 531 U.S. at 62-63. Although sometimes ignored by errant lower courts, this principle is beyond reasonable dispute. *See e.g., Southern California Gas Co. v. Utility Workers Union of America*, 265 F.3d 787, 795 (9th Cir. 2001). (The focus must be on the reinstatement order and not "on the behavior or conduct of the party in question.")
[52] 335 Ore. 198, 63 P.3d 1167 (2003).

> *reinstatement* of an employee who has purchased and used marijuana and then been dishonest about it fail to comply with some public policy requirements that are clearly defined in the statute or judicial decision? If the reinstatement fails to comply with public policy requirements in that way, then it is unenforceable.[53]

The court concluded that a general public policy against the drugs did *not* bar enforcement because it was not a clearly defined public policy prohibiting *reinstatement.* It then remanded the truthfulness issue to the Court of Appeals which had not reached it. The Court of Appeals then reviewed relevant laws and rejected the employer's claim that reinstatement of an untruthful officer was barred by public policy. [54]

**b) The Court of Appeals never identified any public policy that prohibited the reinstatement of Deputy LaFrance nor is there any public policy that prohibits his reinstatement.**

Although the Court of Appeals *stated* that Gaba's award violated public policy, neither it nor the County has demonstrated *how.* The court failed to identify public policies that would be *actually violated* by *reinstatement.* Although the court cited to *Brady v. State of Maryland* in

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[53] 335 Ore. at 205.

[54] 87 Ore. App. 686, 69 P.3d 767, 791 (2003). The Court explained: "Again, the precise question (in light of the Supreme Court's treatment of the drug-use question) is not whether public policy dictates that public safety officers should be honest. Rather, it is this: Does some statute or judicial opinion outline, characterize, or delimit a public policy against reinstating a police officer whom an investigation has found to be, and who has admitted to having been, dishonest but who has not been convicted of dishonesty...in such a way as to leave no serious doubt or question respecting the content or import of that policy? 335 Ore. at 205-06. The county has suggested no such statute or judicial decision, and we cannot find one. We therefore affirm the [reinstatement.]

passing,[55] it did not analyze the affect of *Brady* on the legality of Gaba's order or address the Guild's claim that *Brady* is simply a rule of discovery.

The County's argument fails at the outset on the factual predicate. *The record never establishes any deliberate untruthfulness which would invoke a Brady discovery obligation.* Gaba *never* sustained the claim that LaFrance had intentionally lied[56] and, under *Misco* and its progeny, his findings are *not* subject to judicial reconsideration. *Nor was evidence* was presented in the hearing that any single instance of lying would *per se* be grounds for discharge. In fact, the Arbitrator specifically credited evidence that previous instances of untruthfulness had led to discipline less than termination, in one instance *merely a verbal warning.*[57]

For the County to argue that discharge always follows a dishonesty allegation is itself disingenuous. Obviously dishonesty should be avoided, yet it is unreasonable to conclude that a single instance *always* warrants termination. Human nature being what it is, untruths might be told—and will be told—in varied contexts with varied degrees of wrongfulness.[58] Law enforcement officers are not exempt from principles of human nature. Employees might report themselves sick when not, exaggerate their

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[55] 140 Wn. App. at 522.

[56] The specific allegation presented was not "lying" but "dishonesty." CP 1213. In sustaining the charge of "dishonesty," Gaba expressly did not sustain the County's characterization of LaFrance as having intentionally "lied."

[57] CP 1247.

[58] As Otto Von Bismark once noted: "People never lie so much as after a hunt, during a war or before an election."

performance, minimize their speed, underestimate their tardiness, recharacterize their missteps, or embellish their accomplishments. Discipline for dishonesty should not be decided on any fixed test.[59]

An examination of statutory enactments reveals how off base the public policy claims are: The legislature has adopted an accreditation program for law enforcement officers *which implicitly incorporates this Court's deferential approach to labor arbitration expressed in Stair.*[60]

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[59] Claims sometimes made by law enforcement managers and other public officials that all untruthfulness creates similar moral culpability reflect a false dichotomy. Ironically, some academics seem to have a stronger grasp on the real world realities of truth telling than these officials. The best example of this type of analysis is set forth by Rutgers University Philosophy Professor Harry Frankfurt in his quirkily named yet insightful essay on the gradation of untruthfulness. *See* Frankfurt, ON BULLSHIT (2005). *See* also, Taslitz, *Do We Want Citizens to Know their Rights, and if so, How do we tell Them? Bullshitting the People: The Criminal Procedure Implications of a Scatological Term* 39 TEX. TECH. L. REV. 1383 (2007). Arbitrator Gaba is simply one in a sequence of arbitrators recognizing these real world distinctions by modifying discipline relating to untruthfulness. *See City of Houston* 125 LA 116 (Moore 2008) (officer misrepresented his location); *Shawnee County,* 123 LA 1659 (Daly 2007) (officer provided false explanation as to why she was late to work); *Union County Sheriff*, 123 LA 1101 (Sellman 2007) (officer made, and then failed to correct, inaccurate report as to his certification status); *Prince George's County*, 120 LA 682 (Smith 2004) (false statements made during interview partially mitigated when employer had unlawfully denied employee access to a union representative); *City of Milwaukee*, 112 LA 682 (Dichter 1999) (officers statements were false but not intentionally false); *City of Minneapolis*, 106 LA 564 (Bard 1996)(officer made false statements but proof fell short of intentional lying).

[60] In RCW Chapter 43.101, the legislature enacted a program that permits revocation of law enforcement certification for certain types of misconduct. Yet it expressly preconditions the decertification on two triggering events: 1) The alleged misconduct had to have resulted in a discharge; and 2) If appealed, the discharge was upheld. Therefore, the legislature allows a proceeding which could result in a bar to a discharged officer's employment by another policy agency *but it prohibits any such proceeding in any case in which the arbitrator reinstated the employee to its previous employer.*

Gaba properly applied the "seven tests" of just cause recognized in *Stair*.[61] The legislature acknowledges, as did this Court in *Stair*, that arbitrators *should have* wide authority to consider the broad range of aggravating and mitigating factors surrounding employee misconduct.

The Court of Appeal's assumption that public policies bar LaFrance's reemployment finds no statutory basis. Instead, the court undertook "general consideration of supposed public interests" *as it viewed them.* This is precisely what it lacked the authority to do.

**D. Even if this Court were to adopt a Less Deferential Approach, the Court of Appeals nonetheless erred because it failed to consider the Competing Public Policies which protect Individuals with Disabilities.**

In refusing to enforce Gaba's award, the court asserted that "here there are no 'dominant' public policies favoring reinstatement."[62] But the court erred in finding that no public policies favored reinstatement.[63] Established public policies, including the Washington State Law Against

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[61] *See* CP 1242-43. As this Court specifically recognized in *Stair*, an arbitral just cause analysis typically included a determination as to "whether the employer applied its rules even-handedly." (137 Wn.2d at 173.) Here the Guild had asserted, and Gaba concluded, that the County on previous occasions had not discharged for sustained untruthfulness complaints. Although Gaba in this instance ruled that the employer had not violated this prong of the just cause standards, because LaFrance's accusations were different and involved other allegations, Gaba's findings became important in assessing his ultimate conclusion that LaFrance could be eligible to return to employment.

[62] 140 Wn.App at 526.

[63] The Ninth Circuit has recognized that an arbitration award which violates some public policies might nonetheless be confirmed because of counterwailing public policies. *Aramarck, supra*, 530 F.3d at 832 n. 10.

Discrimination, require the accommodation of individuals with disabilities.[64]

It was precisely these mandates the arbitrator considered. He concluded that the County was, or should have been, aware of LaFrance's mental conditions which led to the misconduct that the County then sought to fire him for. Recognizing the inequity and the mitigation, the arbitrator reasonably provided LaFrance another opportunity to establish his fitness.

In *Stead v. Machinists Lodge*,[65] the Ninth Circuit articulated why an arbitrator's reinstatement award of an employee who can be rehabilitated must be enforced:

> Ordinarily, a court would be hard-pressed to find a public policy barring reinstatement in a case in which an arbitrator has, expressly or by implication, determined that the employee is subject to rehabilitation and therefore not likely to commit an act which violates public policy in the future. As *Misco* recognized, an arbitral judgment of an employee's "amenability to discipline" is a factual determination which cannot be questioned or rejected by a reviewing court.[66]

Using his clear authority to craft a remedy, Arbitrator Gaba concluded that LaFrance might be amenable to rehabilitation. It was error for the Court of Appeals to vacate such a decision.

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[64] RCW 49.60. Federal laws also mandate the accommodation of individuals with disabilities in a wide realm of activities. *See e.g.,* Americans With Disabilities Act, 42 U.S.C. §§ 1210 et seq.

[65] 886 F.2d 1200 (9th Cir. 1989).

[66] *Id.* at 1213. *See also Teamsters v. BOC Gases*, 249 F.3d 1089 (9th Cir. 2001) (the arbitrator's conclusion that the employee was fit for duty, after successfully passing several fitness for duty evaluations, foreclosed any determination that reinstatement could violate such a public policy.)

**E. Once this Court determines that the Decision should be enforced as written, it should review and overturn the trial court ruling, never reached by the Court of Appeals, concerning the reinstatement of Deputy LaFrance.**

Enforcement of Gaba's award by this Court requires addressing another issue which, due to its disposition, was not addressed by the Court of Appeals: The Guild's cross appeal seeking wages for the months between the award and LaFrance's return to duty. The parties have briefed this issue in detail in the briefs below which are before this Court and the Guild will not reargue all those here.

The County's position rests on an misapprehension of Gaba's award. Gaba rescinded the discharge. Recognizing issues remained about LaFrance's fitness, Gaba directed that LaFrance only be allowed "to return to *full duty* upon passing independent psychological and fitness exams as normally utilized by the Employer."[67] But the County refused to reinstate LaFrance, asserting that his *reinstatement as an employee* was conditional.

Gaba revoked *the discharge*. Under established labor law doctrine, his jurisdiction lapsed and the Award was *final*. Under the doctrine of "functus officio," Gaba lacked jurisdiction over any return to work conditions: "An arbitrator's jurisdiction ends when a final award is issued."[68]

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[67] CP 1253. (Emphasis supplied.)

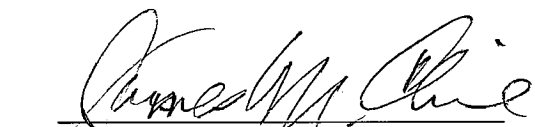
[68] Elkouri, supra, at 325. This lapse is distinguishable from the situation in *Sunshine Mining Co. v. Steelworkers,* 823 F.3d 1289 (9th Cir. 1987) in which the Ninth Circuit allowed continued arbitral jurisdiction over fitness examinations where the arbitrator had

In short, once Gaba issued an award rescinding the discharge, LaFrance was to be immediately reinstated, subject to a condition subsequent. The County *did* have a right to verify that he could perform the deputy duties before it extended him commission authority. If it decided then to discharge LaFrance due to lack of fitness, this action could have resulted in a *separate* grievance and *separate* arbitration hearing.

## III. CONCLUSION

For the foregoing reasons, the Award of Arbitrator Gaba should be enforced, and relief should be accorded under its terms.

**RESPECTFULLY SUBMITTED** this 15th day of September, 2008, at Seattle, Washington.



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ordered the examinations as a condition of reemployment and had simultaneously retained jurisdiction to supervise that conditions. Perhaps Gaba *could have* retained such jurisdiction when he issued his order, but he did not.